

private contract to buy/sell water does
not eliminate requirement of obtaining
Dept. approval for change

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	FINAL ORDER
RIGHT NO. V 157350-76H BY NEIL AND)	
VIRGINIA MILLER)	

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. One timely exception was received, from Randolph Peterson. For the reasons stated below, and after having given the objections full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the April 4, 1985 Proposal for Decision, and incorporates them herein by reference.

RESPONSE TO EXCEPTIONS

The Department hereby responds to the exception made by Randolph Peterson to the Proposal for Decision in this matter.

The Proposal for Decision was issued with a Notice which states in relevant part the governing rule of procedure:

"Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies."

See Administrative Rule of Montana § 36.12.229(1). However, Mr. Peterson's exception to the Proposal consists of general allegations of misstatements of facts, and errors in the logic

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and legal conclusions of the Proposal. Since he has not specified what he considers to be in error, it is impossible to respond to Mr. Peterson.

The only specific argument which Mr. Peterson has set forth is that he questions the Hearing Examiner's "legal authority/ability to interfere with a private transaction between two parties." However, proposed changes in appropriation water rights are governed by statute, as well as by contract law, in Montana, and it is necessary for the appropriator to fulfill the statutory requirements as well as whatever contractual requirements he has incurred.

The Montana Water Use Act, MCA § 85-2-402, states, "Without obtaining prior approval from the department, an appropriator may not sever or sell all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands." The fact that the appropriator has entered into a private contractual agreement with another party in no way obviates his duty to obtain Departmental approval for a proposed change of an appropriation right, nor does it alter the Department's statutory obligation to review the proposed change.

In addition, to hold that the Department may not act where such action might interfere with a "private transaction" would allow any party wishing to buy or sell water rights to step

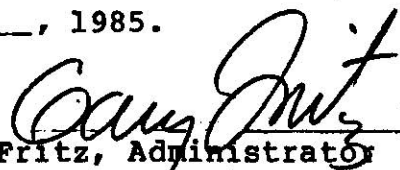
outside of the law by claiming that the transaction is a private contract matter. Such unregulated changes would undermine the entire priority system by which water rights are determined in this state. See Castillo v. Kunneman, 39 St. Rep. 460 (1982) at 464. See generally Holstrom Land Co., Inc. v. Ward Paper Box Co., 185 Mont. 409, 605 P.2d 1060 (1979); In the Matter of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates, Proposal for Decision, August 25, 1981. Such a result is antithetical to the statutes and case law which govern Montana Water Use Law.

Therefore, based upon the Findings of Fact and Conclusions of Law, all files and records in this matter, and any modifications specified herein, the Department makes the following:

FINAL ORDER

Application for Change of Appropriation Water Right No. V 157350-76H by Neil and Virginia Miller is hereby denied.

DONE this 15 day of July, 1985.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

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AFFIDAVIT OF SERVICE

STATE OF MONTANA

MAILING

) FINAL ORDER

) ss.

County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 16, 1985, she deposited in the United States mail, First Class mail, an order by the Department on the Application by Neil & Virginia Miller, Application No. V 157350-76H, for an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Neil & Virginia Miller, P. O. Box 3176, Missoula, MT 59806
2. Randolph V. Peterson, 7150 Hayes Creek Rd., Missoula, MT 59803
3. Marjorie E. and Gary E. Collins, 6000 Hayes Creek Rd. Missoula, MT 59803
4. Henry A. & Beth A. Blastic, Jr., 6025 Hayes Creek Rd., Missoula, MT 59801
5. Keith R. & Marie E. Swinger, 6055 Bitterroot Rd., Missoula, MT 59801
6. Mike McLane, Supervisor, Water Rights Bureau Field Office, Missoula, (inter-departmental mail)
7. Peggy A. Elting, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Elser

STATE OF MONTANA

)

) ss.

County of Lewis & Clark)

On this 16th day of July, 1985, before me, a Notary Public in and for said state, personally appeared Donna K. Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT NO. V 157350-76H BY NEIL AND)
VIRGINIA MILLER)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held on June 27, 1984, in Missoula, Montana.

Randolph V. Peterson, the party receiving the water use rights interest in this matter, appeared personally.

Neil R. and Virginia A. Miller, the Applicants to Sever or Sell Appropriation Water Rights, gave Randolph Peterson written designation to appear for them in this matter.

Objectors Marjorie E. and Gary E. Collins appeared personally.

Objector Henry A. Blastic, Jr. appeared personally.

Objectors Keith R. and Marie E. Swinger appeared personally.

David Pengelly, Field Manager of the Missoula Water Rights Bureau Field Office, appeared as staff expert for the Department of Natural Resources and Conservation (hereafter, the "Department").

The hearing in this matter was reconvened on August 6, 1984, in Missoula, Montana, for the purposes of covering issues raised at the initial hearing on June 27, 1984, and of taking testimony from Mr. Miller, who did not appear at the initial hearing.

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On August 6, 1984, Randolph Peterson appeared personally.

Neil R. Miller appeared personally.

Objectors Henry and Beth Blastic, Jr., Keith and Marie Swinger, and Gary Collins appeared personally.

STATEMENT OF THE CASE

On August 8, 1983, Applicants Neil R. and Virginia Miller filed an Application to Sever or Sell an Appropriation Water Right, seeking to sever 40 gallons per minute (gpm) up to 3 acre-feet per year of a total water right for 100 miner's inches which had been decreed to Miller's predecessors in interest, Henry Buckhouse and Henry Deuschin, out of Hayes Creek, and for which the Millers have filed a Statement of Claim for Existing Water Rights. The Application names Randolph V. Peterson as the party receiving the interest (the severed portion of the claimed water right) in this matter.

The water for which the Application has been made would be severed from the land to which it is appurtenant in Section 02, Township 12 North, Range 20 West, and applied to 1 acre of land in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 12 North, Range 20 West, all in Missoula County, Montana. The diversion point for the severed portion of the claimed water right would be moved from the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10 to the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, all in Township 12 North, Range 20 West, Missoula County, Montana. The diversion would be made by pump at the new point of diversion, from June 1 to September 30, inclusive, of each year.

The pertinent portions of the Application were published in The Missoulian, a newspaper of general circulation in the area of the source, on November 9 and November 16, 1983.

Timely objections were filed to the Application by Keith R. and Marie E. Swinger, Henry A. and Beth A. Blastic, Jr., and Gary E. and Marjorie E. Collins.

Mr. and Mrs. Swinger objected to the Application on the bases that the Applicants' predecessor in interest, Henry Buckhouse, let his water right lapse and/or the U. S. Government took over the right and later assigned it to a homesteader; that Millers' claimed point of diversion no longer exists; that there are no unappropriated waters in Hayes Creek from which a new appropriation could be made; that the other property owners have depended upon the creek during a long period of time during which Millers' claimed right was not utilized; that the Objectors' property would be devalued and their property taxes wasted if they cannot use their water rights; and that Mr. Peterson does not have access to the creek. The Swingers alleged that Mr. Peterson already has committed trespass and damage to real property in attempting to gain access to the creek.

Mr. and Mrs. Blastic, Jr. objected to the Application on the basis that there are water shortages in at least some months of the year, that there are already several water users in the vicinity and the number is increasing, and therefore water is not available for Mr. Peterson's use. The Blastics stated that the proposed appropriation of 40 gpm would deplete the entire source,

and would aggravate water use conflicts on the source. The Blastics also objected on the bases that Mr. Peterson does not have any creek frontage and therefore would have to cross others' property; that they do not want this invasion of privacy and loss of property value; and that Mr. Peterson trespassed and infringed upon the peaceful enjoyment of their property during the summer of 1983 while "operating a pump on Hayes Creek without a permit." An additional concern voiced by the Blastics is that "the Hayes Creek drainage is dwindling as viable and precious habitat for fingerling trout, aquatic flora and fauna. . .". Mr. Blastic also stated in the objection that he has never seen or heard of Mr. Miller using Hayes Creek water.

Mr. and Mrs. Collins objected to the Application on the basis that there is insufficient water in Hayes Creek; that they went without water for several days in 1983 and had insufficient water to operate the sprinklers for irrigation on several other days.

A June 7, 1984, Field Report was prepared by David Pengelly for inclusion in the Department's contested case file in this matter, documenting a June 5, 1984, site visit, and setting forth the appropriation rights of the parties, with maps and public record information included in the report.

Exhibits

The Applicants submitted one exhibit for inclusion in the record in this matter:

Applicants' Exhibit 1 is a photocopy of a letter signed "Neil R. Miller," designating Randolph Peterson to appear on Mr. Miller's behalf at the June 27, 1984, hearing on this matter.

Applicants' Exhibit 1 was accepted into the record without objection.

Mr. Peterson also read into the record the language of Article 9, Section 3 of the Montana Constitution.

The Objectors submitted one exhibit in support of their objections to the Application in this matter:

Objectors' Exhibit A2 is a photocopy of the last page of an agreement form used on State Highway Project 47 (1965), File 215 (18), signed by Neil and Virginia Miller and by State Highway Commission officials, stating: "The Grantor hereby releases forever the State Highway Commission from the obligation of providing a ditch to carry the water right from Hayes Creek to subject property (Station 712 to 727 + 50)". Objectors' Exhibit A2 was accepted into the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Applicants in this matter are Neil and Virginia Miller. The party receiving interest in this matter is Randolph Peterson.

3. The Application to Sever or Sell Appropriation Water Right No. V 157350-76H was duly filed with the Department of Natural Resources and Conservation on August 8, 1983, at 2:06 p.m.

4. The source of supply for the appropriation right in this matter is Hayes Creek, a tributary of the Bitterroot River.

5. In 1959, Gust Wornath claimed to be using the decreed Buckhouse-Deuschin water right to irrigate 12 acres in the S $\frac{1}{2}$ of Section 2, Township 12 North, Range 20 West, with the water being diverted out of Hayes Creek by means of the Wornath Ditch. (Missoula County Water Resources Survey, August 14, 1959. See June 7, 1984, Memorandum by David Pengelly, p. 5.)

On February 26, 1964, Gust Wornath sold property to Neil and Virginia Miller, "with water rights from Hayes Creek." (Documentation, signed by Neil Miller, accompanying SB76 Claim on the water right in this matter.)

6. Applicants Neil and Virginia Miller timely filed a Statement of Claim for Existing Water Rights (hereafter, "SB76 Claim") for Irrigation on the water right for which the Application to Sever or Sell has been made. The Applicants filed

two amendments to their SB76 claim: the first amendment, submitted in letter form in August, 1983 and on an amended SB76 claim form in September, 1983, changed the number of acres claimed to be irrigated from 2 to 90. The second amendment, made in September, 1983, changed the claimed priority date from June 17, 1885, to May 1, 1871.

The SB76 claimed right is based on a water use right of 100 miner's inches (1122 gallons per minute) decreed to Henry Buckhouse and Henry Deuschin in 1884, with a priority date of May 1, 1871. (Book A, Page 384, Judgment Records, Case No. 575.) The decree does not specify a volume amount for the diversion, nor a description of the place of use, although it does state that the water right is for irrigation.

The amended SB76 Claim lists the place of use for the claimed right as Section 2, Township 12 North, Range 20 West (20 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 25 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 18 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, and 27 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2), all in Missoula County, Montana. The volume of water claimed is 15 acre-feet per year, diverted at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 12 North, Range 20 West, for use between June 1 and September 30 of each year.

7. On the basis of his investigations, Missoula Area Office Manager David Pengelly stated in his June 7, 1984, Memorandum in this matter:

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At the present time, it is not possible to convey water from Hayes Creek to the place of use claimed by the Millers by the ditch system described in their claim. The original diversion point appears to have been the same as that currently used by Mr. Collins. This point is located in the NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 12 North, Range 20 West, Missoula County. The ditch is currently used to deliver water to Mr. Collins and then it ends in a draw just past Mr. Collins's eastern property boundary in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 10. At this point, the ditch is filled in due to a considerable period of non-use. It would not have been possible to use the ditch system after about 1968 due to the construction of the 4-lane highway between Missoula and Lolo. There is a large road-cut on the face of a ridge in the NW $\frac{1}{4}$ of Section 11 that has obliterated any evidence of the ditch.

8. Mr. Miller testified that he has had no occasion to use the claimed right for irrigation since purchasing the property in 1964. He stated that it not been his intent to abandon the water right, however. He testified that he had retained the water right when he sold the property, and later (approximately 1967) had offered it to a proposed development for use in a lake; that the developers had checked out the water right and found it to exist, but had never put in the proposed development. Mr. Miller testified that he subsequently leased the water right to Lloyd Owen "for one silver dollar a year", for five years beginning in 1975.

Subsequent to the June 22, 1984 portion of the hearing in this matter, Mr. Miller submitted a signed letter to the Department, referencing "Water Rights File No. V-157350-76H", stating: "Regarding the above Water Rights, if the Department of

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Natural Resources will approve the Peterson application for 40 G.P.M. we will abandon rights and interest in the remaining water rights." (Letter dated June 28, 1984, received by the Department on June 29, 1984.) Mr. Miller confirmed the intent expressed by this letter in testimony at the August 6 portion of the hearing in this matter.

9. Randolph Peterson, the party receiving interest in the Sever or Sell agreement, wants to use a portion of the Miller claimed water right for lawn and garden irrigation of one acre of land located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 12 North, Range 20 West, Missoula County, Montana. The amount of water proposed to be severed from the Miller claimed right is 40 gpm up to 3 acre-feet per year, to be diverted from Hayes Creeek by means of an electric pump and 3/4" plastic pipe leading to the place of use. The proposed period of use is June 1 to September 30 of each year. Mr. Peterson testified that he would expect to use the water very little in June, and about 10 hours a week for the rest of the irrigation period.

The requested point of diversion is located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 12 North, Range 20 West. This location is upstream from all of the Objectors' points of diversion. Mr. Peterson testified at the hearing that he would be willing to move the point of diversion; he suggested that a possibility would be returning to the original point of diversion for the Miller right (out of the Wornath ditch, somewhere "to the east of Blastics' gate").

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10. Keith and Marie Swinger have filed an SB76 Claim for Irrigation, based on a Notice of Appropriation filed on July 15, 1926, by George Bennett. (Objection to Application W 157350-76H, received November 28, 1983; June 7, 1984 Memorandum by David Pengelly.) On their objection form, the Swingers noted a use right dating back to 1912, although the filed Notice of Appropriation claims a priority of July 8, 1926.

The claimed flow rate is 10 miner's inches (112.2 gpm or .25 cfs), up to a total claimed volume of 30 acre-feet of water per year, to be diverted between April 1 and October 31 of each year. The claimed point of diversion is the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, Township 12 North, Range 20 West, while the claimed place of use is 9 acres in the NE $\frac{1}{4}$ and 1 acre in the NW $\frac{1}{4}$ of Section 10, Township 12 North, Range 20 West, all in Missoula County, Montana. The field investigation in this matter indicates that the correct legal for the point of diversion is NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10. (June 7, 1984 Memorandum by David Pengelly.)

11. Mr. and Mrs. Swinger testified that they believe the underlying right in this matter, claimed by the Millers, has been abandoned.

Mrs. Swinger testified that the water may have left the Applicants' chain of title as early as 1912, when the Swingers' predecessor in interest, George Bennett, was granted homestead rights on land that the federal government had purchased from

Applicants' predecessor Henry Buckhouse; the homestead grant allegedly included the rights to all waters in Hayes Creek. (See Objection to Application filed by Keith and Marie Swinger.)

Mr. and Mrs. Swinger testified that if the water right had not been lost at the time Mr. Bennett was granted homestead rights, it has been lost since through nonuse; that they have lived on the property at Hayes Creek for 25 years and have never seen the Millers' claimed water right used during that time, apart from two years when Lloyd Owen utilized a small amount to irrigate some trees. (Mr. Swinger testified that Lloyd Owen was not able to pump from the Millers' claimed point of diversion when he leased the water right from Miller, so was allowed to put a small pump in Hayes Creek on Swinger property for two years to irrigate some trees.) Mr. Swinger stated that he would have had knowledge of any diversion which had been made within the last 25 years, since the Applicants' claimed point of diversion is located on Swinger property.

Mr. Swinger further stated that the road to Blue Mountain, shown on the Water Resources Survey map published in 1960, cut through the Wornath ditch, and that water could not have been diverted through that ditch to the Wornath property after that time. (See p. 4, June 7, 1984, Memorandum by David Pengelly.) He stated that houses had been built over the ditch right of way between the Applicants' claimed points of diversion and of use as long ago as 22 years.

Mr. and Mrs. Swinger testified that they do not believe Hayes Creek has ever had a flow of 100 miner's inches (1122 gpm), even during run-off. They stated that the flow sometimes is as low as 100 gpm in September, and that the proposed diversion of 40 gpm would take 40 percent of the creek flow at such times.

12. Henry and Beth Blastic have a Provisional Permit, with a priority date of May 19, 1975, for irrigation water from Hayes Creek. The Permit flow rate is 18 gpm (.04 cfs), up to a total volume amount of 3 acre-feet per year, to be diverted between April 15 and October 15 of each year.

The Blastics' point of diversion is located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, and their place of use is 2 acres in the NE $\frac{1}{4}$ of Section 10, all in Township 12 North, Range 20 West, Missoula County, Montana.

13. Henry Blastic read into the record a copy of the statement which accompanied his Objection to the Application in this matter, alleging overuse of Hayes Creek, water shortages and conflicts, and the impacts that the proposed use would have on creek habitat and on the general rights of the Objectors. (See Statement of the Case.)

Mr. Blastic stated that he does not want Mr. Peterson to be able to gain access to Hayes Creek across the Blastic property; that Mr. Peterson had used the Blastic right-of-way without permission in 1983, and the pumping had proved to be very intrusive to the Blastics' quiet enjoyment of their property.

Mr. Blastic further stated that allowing Mr. Peterson to pump potentially would harm the property value if it reduced the water available to the Blastics.

Mr. Blastic testified that, during his decade of living on Hayes Creek, he has never seen or heard of the Millers' claimed right being used.

14. Gary and Marjorie Collins have SB76 Claims for irrigation and stockwater use, originally filed by their predecessor in interest, Agnes Breuer. The Claims are based on an unquantified right decreed to William E. Boss in the 1884 decree on Hayes Creek (Book A., Page 384, Judgment Records, Case No. 575.) (William Boss and Edward Hayes were "forever enjoined and restrained from diverting waters" from Hayes Creek, except those amounts in excess of the 100 miner's inches awarded to Henry Buckhouse and Henry Deuschin.) The Claims list a priority date of June 9, 1884, the date of the decree.

The claimed flow rate for the irrigation right is 120 gpm, up to a total claimed volume of 22.5 acre-feet per year, to be diverted between April 15 and November 15 of each year. The claimed flow rate for the stockwater is 120 gpm, up to a total claimed volume of 12 acre-feet per year, to be used between April 15 and November 15 of each year. The claimed point of diversion is the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10 and the claimed place of use is the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, all in Township 12 North, Range 20 West, Missoula County, Montana.

15. Mr. Collins stated in his Objection in this matter that he was unable to irrigate on several days in June, July, August, and September of 1983; he testified at the hearing that he is worried that the problem will worsen: he alleged that Mr. Peterson is subdividing his property, and that more people will be putting their pumps in the creek without anything being done about it.

In response to Mr. Peterson's offer to move the point of diversion to the original (Miller) point of diversion in the Wornath ditch, Mr. Collins stated that when Mr. Peterson is operating his pump, Mr. Collins cannot operate his own pump from the ditch.

Based upon the foregoing proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all parties hereto, whether present at the hearing or not.
2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore the matter was properly before the Hearing Examiner.

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3. The Department must approve an Application to Sever or Sell an Appropriation Water Right if it determines that the proposed change will not adversely affect the rights of other persons.
MCA § 85-2-402(6).

4. The phrase "the rights of other persons" has been interpreted to mean the water rights of other persons: injuries to the vested water rights of other appropriators are the only types of injuries which can be raised to defeat an appropriation change. See In the Matter of the Application for Change of Appropriation Water Right No. W 138008 by Delbert Kunneman, Proposal for Decision, January 20, 1984 (Final Order, April 23, 1984).

Therefore, the various concerns expressed by the Objectors regarding stream access, environmental impact, and potential future actions by Mr. Peterson have not been given weight in reaching the proposed decision in this matter.

5. A water right is usufructuary, that is, based upon the actual use of the water rather than upon "paper rights." Numerous Montana cases embody the concept that a water right is defined by the actual use of the water, rather than by the amount claimed by, or even decreed to, a water right holder. See 79 Ranch Inc. v. Pitsch 40 St. Rep. 981, 666 P.2d 215 (1983), Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940), Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935), Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927), Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914), Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898).

6. Where an appropriator ceases to use his water right, with intent to abandon it, the right ceases to exist. Nonuse for an extended period of time is strong evidence of intent to abandon. See Pitsch v. 79 Ranch, supra, Smith v. Hope Mining Co., 18 Mont. 432, 45 P. 832 (1896).

7. There is insufficient evidence in this record to reach a determination, for the purposes of Departmental action on the Application to Sever or Sell, that the claimed water right has ceased to exist. (See Memorandum.)

Although the prima facie evidence of the existence of the water right which is created by proper filing of an SB76 Claim has been contradicted by other evidence (See Findings of Fact 7, 11, 13), Mr. Miller's testimony indicates that he did not intend to abandon the claimed right, and that the right has been the focus of some activity, in the sense that Mr. Miller has leased a portion of the right, and is now attempting to sever or sell a portion of it. (Finding of Fact 8). (But see Goon v. Proctor, 27 Mont. 526, wherein the court found that allowing ditches and flumes to fall into disrepair and become filled up shows intent to abandon; and Bailey v. Tintinger, 45 Mont. 54, 122 P. 575 (1912), wherein the court stated, "An appropriator's right is not to be limited by the capacity of his canal while out of repair, unless that condition has existed for such length of time as to indicate an intention on the part of the appropriator to claim no more water than the canal in that condition will carry." At 163. See also Haggin v. Saile, 23 Mont. 375 (1899).)

8. While the Department has no authority to make final determinations on the issues of abandonment or the scope of existing rights, and in this matter has determined that the claimed right or some portion thereof possibly still may exist, it does not have sufficient evidence concerning the historic use of the claimed right to be able to authorize a change of it.

As discussed in the Memorandum, infra, a historic use is defined by the way it was used, the established patterns of time, and place, and flow requirements, delineate the right. When an application is made to change such a right, the new use must be compared to the old to ensure that the change will not result in adverse effects to other appropriators.

In the present matter, there is not enough evidence on the scope of the historic use right to allow for a comparison of the historic use and the applied-for, "changed" use. The Applicants have failed to sustain the burden of proof on the issue of the scope of an existing right, and therefore the Department cannot authorize a change.

9. The Department has no authority to prevent the Applicants from utilizing the claimed right in conformity with the use described in their SB76 Claim; that is, the water may be diverted from the point of diversion claimed by the Millers and used on the place of use claimed by the Millers, in the amounts and during the periods claimed as the historic use. However, the Department cannot authorize the Applicants to exercise the right

by means of the proposed use described in the Application to Sever or Sell Appropriation Water Right No. V 157350-76H. (See generally, Title 85, Chapter 2, Part 2, MCA (1983), In the Matter of the Application for Beneficial Water Use Permit No. 51282-s412 and Application for Change of Appropriation Water Right No. G 139972-412 by Ben Lund Farms, Inc., Proposal for Decision, November 14, 1984 (Final Order, January 21, 1985).)

The Applicants in this matter are entitled to petition the appropriate district court for a determination of the existing rights, pursuant to MCA 85-2-406(2), and then reapply for Sever or Sell authorization based on the determination. No loss of priority will result from such action, since any severed water right which is authorized will retain the priority date assigned to the original, claimed right.

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Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Change of Appropriation Water Right No. V 157350-76H by Neil and Virginia Miller is hereby denied.

DONE this 4th day of April, 1985.

Peggy A. Ewing
Peggy A. Ewing, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposal, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception

relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

MEMORANDUM

The Objectors in this matter have raised the issue of abandonment with regard to the claimed water rights for which the Applicants have requested sever/sell authorization.

Final determinations concerning water rights which vested prior to 1973 are solely within the province of the water court adjudication system, as set forth in MCA Title 85, Part 2, Chapter 2. Administrative decisions do not carry the weight of finality on determinations of ownership, nor does an appropriator obtain any rights through a change approval that are not contingent upon a verification of the underlying right in the adjudication process. See Meadow Lakes, infra, In the Matter of the Application for Change of Appropriation Water Right No. G-05081 and G-05083 by Neil W. Moldenhauer, Final Order, March 24, 1984. However, the Department must make preliminary administrative findings on water rights in order to perform its mandated function of authorizing or denying applications for change of water rights. See In the Matter of the Application for Change of Appropriation Water Right Nos. G-05081 and G-05083 by Neil W. Moldenhauer, Final Order, March 20, 1984; In the Matter of the Application for Beneficial Water Use Permits Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates and In the Matter of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by

Meadow Lake Country Club Estates, Final Order, October 6, 1981;
Whitemore v. Murray City 107 Utah 445, 154 P.2d 748 (1944);
United States v. District Court of Fourth Judicial District, 121
Utah 18, 242 P.2d 774 (1952).

One of the determinations that the Department must make in change proceedings is the existence of the right for which the application for change has been made.

Although the governing factor in change proceedings perforce of the statutory language is the absence of adverse affect [sic] to the rights of other persons, the entire provision implicitly assumes that the petitioner for such a change is a water right holder. The section speaks to the change of a water right. It is well-settled that such a right is a usufructuary interest only, and accords the appropriator no privileges by way of ownership of the corpus of the water. Thus, a water right accords an appropriator only a right to use a certain quantity of water for some specified purpose. A petitioner for a change must therefore adduce proof of such characteristics of a water right in order to demonstrate as a threshold matter some legally cognizable interest in the proceedings. (Citations omitted.) Meadow Lakes, supra, Proposal for Decision, August 25, 1981, at 56.

In the present matter, the Applicant must make a threshold showing of the existence of the water use right that he wishes to sever or sell. See In the Matter of the Application for Beneficial Water Use Permit No. 20736-s41H by the City of Bozeman

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and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H, Proposal for Decision, June 4, 1984 (Final Order issued January 9, 1985).

SB76 Claims (Statements of Claim for Existing Water Rights) which have been properly filed as required by the adjudication process constitute prima facie evidence on the matters asserted therein, with regard to the historic use for which the claim has been filed. However, such prima facie evidence can be contradicted and overcome by other evidence. MCA § 26-1-102(6). See Marshall v. Minischmidt, 148 Mont. 263, 419 P.2d 186 (1966), Vidal v. Kensler, 100 Mont. 592, 51 P.2d 235 (1935). It is then necessary for the holder of the SB76 claim right to introduce further evidence concerning the existence of the right. (See Burden of Proof, infra.)

In conjunction with the requirement that the underlying water use right must be shown to exist before it can be changed, the Applicant must also show the extent and pattern of the past use ("historic use") of the water, to ensure that the proposed change will not create a greater demand on the source of supply, at any given time, than existed as a consequence of the previous usage of water. As noted in Beaverhead, infra, "The doctrine of historic use, although speaking to enlargements of use, is nothing more than a backhanded way of describing other appropriators' rights to maintenance of the stream conditions. . . . Because of the scarcity of water in the arid West, the doctrine of appropriation accords property interests in

such stream conditions in order to provide security for the development of water. . .". (Citations omitted.) Beaverhead, at 17-18.

The historic use pattern of a given water right defines not only the quantity of water which the holder of the right will be accorded, but also the time frame during which the right may be exercised. For example, an appropriator who changed his water use from mining to irrigation was held to be restricted to using the water in the spring and fall seasons, when the water had been used for mining. Smith v. Duff, 39 Mont. 382, 102 P.984 (1909). In Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927), the appropriator likewise was restricted to using his changed use in conformity with the pattern of water use he originally had established.

Burden of Proof

Historically (before the advent of the Montana Water Use Act), the burden of proof in change proceedings was on the objector. See Holstrom Land Co. v. Meagher County Newland Creek Water Dist., 36 St. Rep. 1403, 605 P.2d 1060 (1979); "the burden is on the party claiming to be prejudiced by such change to allege and prove the facts". Lokowich v. City of Helena, 46 Mont. 575, 129 P., 1063 (1913).

However, in response to the changes wrought in water processes by the advent of the Montana Water Use Act, the Department has recently redefined the allocation of the burden of proof in cases where a change of water right is involved. See In

the Matter of the Application for Beneficial Water Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H, Proposal for Decision, June 4, 1984 (Final Order issued January 9, 1985), In the Matter of the Application for Change of Appropriation Water Right Nos. 36294-c41A, 36295-c41A, 36296-c41A, 36297-c41A, 36298-c41A 36299-c41A, 36300-c41A and 36301-c41A by Beaverhead Partnership, Proposal for Decision, February 11, 1985.

To summarize the lengthy discussion contained in these proposals, "the applicant for a change of water right bears the burden of production on the specifics of his intended change and on the existence of the water right that is the subject matter of the change. The burden of production is discharged when the evidence and all reasonable inferences therefrom, viewed in a light most favorable to the applicant, is sufficient to allow a reasonable mind to conclude that the ultimate fact exists". City of Bozeman, supra, Addendum A. In addition, the applicant bears the burden of persuasion on all relevant and material issues, the standard being the preponderance ("more likely than not") test. See MCA § 26-1-403.

The objectors to an application for change bear the burden of production on the questions of the scope and character of their existing rights and on the issue of injury to their rights: the latter burden extends to the kind and character of adverse effect

upon which the objection has been made, although not to the specific amount or measure of such adverse effect. "Much of this information will be peculiarly within the province of the objector, and it is not to be expected that the legislature intended an applicant to bear the burden of production thereon." (Citations omitted). City of Bozeman, supra, Addendum A.

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